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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

LEXINGTON INSURANCE COMPANY,

Plaintiff and Respondent,

v.

TIMBER RIDGE FRAMING, INC.,

Defendant and Appellant.

D073412

(Super. Ct. No.
37-2016-00013390-CU-BC-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, John S. Meyer, Judge. Affirmed.

Morris Sullivan Lemkul and Will Lemkul, Joseph L. Oliva, Matthew J. Yarling for Defendant and Appellant.

Van Susteren Law Group and Adam Van Susteren for Plaintiff and Respondent.

Defendant and appellant Timber Ridge Framing, Inc. (Timber Ridge) appeals from a summary judgment entered in favor of plaintiff and respondent Lexington Insurance Company (Lexington), on Lexington's complaint for breach of contract seeking to recover from Timber Ridge \$50,000, the amount of two \$25,000 insurance deductibles,

arising from construction defect claims for which Lexington provided coverage. The trial court granted summary judgment on grounds Timber Ridge did not establish a triable issue of material fact as to any defense, including its defense that there was continuous and progressive damage and thus only one claim in each of two actions on which it owed a deductible, which it had already paid to another insurance company.

Arguing that California law prohibits "stacking" of multiple insurance policy deductibles when there is a continuous and progressive loss, Timber Ridge contends the trial court erred by requiring it to pay two deductibles in each lawsuit for a single claim in violation of that rule. It also contends Lexington did not meet its summary judgment burden of production to show no triable issue of material fact, and Timber Ridge presented undisputed evidence establishing a triable issue of fact, as to the existence of a continuous and progressive loss arising from the same occurrence, requiring that the summary judgment be reversed. Timber Ridge asks that we instruct that Timber Ridge satisfied its deductible obligations and remand for further proceedings.

As we will explain, resolution of the insured's responsibility to pay the deductible in this case turns on the literal language of the particular insurance policy as well as the objectively reasonable expectations of the insured. (*Powerine Oil Co., Inc. v. Superior Court* (2005) 37 Cal.4th 377, 404; *Admiral Insurance. Co. v. Superior Court* (2017) 18 Cal.App.5th 383, 387; see, e.g., *Montrose Chemical Corp. v. Superior Court* (2017) 14 Cal.App.5th 1306, 1312, review granted Nov. 29, 2017, S244737 [resolving stacking issue as to how insurance policies may be accessed "on a policy-by-policy basis, taking into account the relevant provisions of each policy"].) Those considerations compel us to

hold that under the policy at issue, which clearly and explicitly requires the insured to pay a \$25,000 deductible per claim and reimburse the insurer if the insurer has paid any part of the deductible to effect settlement of any claim, the insured must pay the insurer its deductible notwithstanding the existence of other policies covering the same claim or occurrence or the insured's payment of deductibles under those other policies.

Based on the clear and explicit terms of the deductible endorsement of the insurance policy at issue and the undisputed facts, Lexington met its burden of establishing Timber Ridge must reimburse it \$50,000 in deductibles for payments it made in settlement of the two claims at issue in this action. Because Timber Ridge cannot raise a triable issue of material fact to the contrary, we affirm the judgment in Lexington's favor.

FACTUAL AND PROCEDURAL BACKGROUND¹

Timber Ridge provided framing on homes in the cities of Chula Vista and Carlsbad. It was sued in two separate cross-complaints by McMillin Construction Services and McMillin Ravinia, LLC, themselves defendants in two San Diego Superior Court construction defect actions. The cross-complaint in one action (the *Perez* action, brought by 95 plaintiffs against McMillin Construction Services), involved 18 homes in Chula Vista framed by Timber Ridge. The cross-complaint in the second action (the

¹ In setting out the background facts, we view the evidence in the light most favorable to Timber Ridge as the party opposing summary judgment, liberally construing its evidentiary submissions while strictly scrutinizing Lexington's showing, and resolving evidentiary doubts or ambiguities in Timber Ridge's favor. (*Elk Hills Power, LLC v. Board of Equalization* (2013) 57 Cal.4th 593, 606; *County of San Diego v. Superior Court* (2015) 242 Cal.App.4th 460, 467; Code Civ. Proc., § 437c, subd. (c).)

Lussenden action, brought by 20 plaintiffs against McMillin Ravinia) involved 11 homes framed by Timber Ridge.

Lexington issued a commercial general liability (CGL) insurance policy (No. 6760949, the Policy) to Timber Ridge for the period April 15, 2006, to April 15, 2007. The Policy provides Lexington "will pay those sums that the insured becomes legally obligated to pay as damages because of . . . 'property damage' to which this insurance applies" and it "will have the right and duty to defend the insured against any 'suit' seeking those damages." The Policy defines "Property damage" as "Physical injury to tangible property, including all resulting loss of use of that property" and further states: "All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or be deemed to occur at the time of the 'occurrence' that caused it." Lexington agreed to provide coverage to Timber Ridge in consideration for a premium and repayment of a \$25,000 deductible "per claim." A deductible endorsement of the Policy states that if the deductible amount is on a per claim basis, it applies "to all damages sustained by any one person because of 'property damage' . . . [¶] . . . [¶] as the result of any one 'occurrence.' " The deductible endorsement also provides: "We may pay any part or all of the deductible amount to effect settlement of any claim or 'suit' and, upon notification of the action taken, you shall promptly reimburse us for such part of the deductible amount as has been paid by us."²

² We sometimes refer to this provision in the deductible endorsement as the reimbursement clause. Under the Policy, Timber Ridge was responsible for all "Allocated Expenses" up to the deductible amount. "Allocated Expenses" were defined

Timber Ridge had additional CGL insurance policies, one with Claremont Liability Insurance Company (Claremont) and two with Arch Specialty Insurance Company (Arch). Those policies also required premium payments with a deductible; under the Claremont policy, Timber Ridge was responsible for a \$5,000 deductible per occurrence, and under the Arch policies it was responsible for a \$1,000 deductible per claim.

Timber Ridge tendered the *Perez* action cross-complaint to both Lexington (via AIG of which Lexington is a member company) and Claremont. Lexington defended the entire action and provided indemnity for 17 of the homes, and Claremont provided indemnity for one home. In January 2015, Timber Ridge paid a \$5,000 deductible to Claremont's third party administrator. Lexington ultimately expended \$10,011.51 on Timber Ridge's legal defense and paid \$20,100 to settle the *Perez* action cross-complaint. Claremont paid \$1500 in settlement.

to include, among other expenses, defense costs and attorney fees. The Policy contains an "other insurance" provision, which states that if any other insurance is primary, Lexington would "share with all that other insurance" as follows: "If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes an equal amount until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first." It also contains an "anti-stacking" endorsement, providing in part: "If this insurance and any other insurance issued to you by us or any member company of American International Group, Inc. apply to the same incident, act, offense. claim. suit, or occurrence, whichever is applicable, the maximum limit of insurance under all insurance available will not exceed the highest applicable limit of insurance available under any one policy. [¶] However, this condition does not apply to any other insurance issued to you by us or any member company of American International Group, Inc. which is specifically intended to be either primary to or in excess of the policy to which this endorsement is attached."

Timber Ridge tendered the *Lussenden* action cross-complaint to Lexington and Arch. Lexington defended the action and provided indemnity for eight of the homes involved in that action. Arch provided indemnity for three homes. In May 2016, Timber Ridge paid \$3,000 in deductibles to Arch's third party administrator. Lexington eventually expended \$10,004.80 in legal defense costs and paid \$16,000 to settle the *Lussenden* action cross-complaint.

Lexington demanded that Timber Ridge pay it \$25,000 for Lexington's defense and indemnity provided in each of the *Perez* and *Lussenden* actions. Thereafter, it filed the present action alleging a single breach of contract cause of action, seeking to recover a total of \$50,000 from Timber Ridge for Timber Ridge's deductible obligations in both actions.

Lexington moved for summary judgment or alternatively summary adjudication of issues. Pointing in part to Timber Ridge's responses to requests for admissions, it argued it provided insurance coverage for two different claims, requiring Timber Ridge to pay two separate deductibles; that the issue of the insurance policy's interpretation was a question of law; and the express policy terms as well as California law compelled a conclusion that a deductible was owed for "every occurrence/claim for which insurance coverage [is] provided" Lexington argued it had proven the existence of the Policy, its own performance under the contract by providing coverage, Timber Ridge's breach of a material contract provision by failing to pay the \$25,000 deductible each for the *Perez* and *Lussenden* claims, and Lexington's damage because it was owed \$50,000 plus prejudgment interest from the filing of its first amended complaint. Lexington argued

that reading a deductible waiver clause into the Policy would improperly rewrite the Policy and it would be unfair to have Lexington provide coverage, resolve all claims, and then hold a deductible need not be paid in the face of express policy language requiring deductible repayment. Lexington further argued that the case law addressing continuous and progressive damages was inapplicable to the construction framing issues and pointed to language in its policy that continuing or progressively deteriorating damage "shall be deemed to be one 'occurrence[,]' and shall be deemed to occur only when such damage first commences." It asserted the Policy allowed it to disregard claims arising from Timber Ridge's work completed before April 15, 2005, and Timber Ridge never instructed it to deny coverage on the cross-complaints so that another carrier could provide coverage.

In opposition, Timber Ridge argued in part that Lexington was not permitted to "stack" deductibles or require it to pay more than one deductible for the same occurrence.³ According to Timber Ridge, the *Perez* and *Lussenden* lawsuits involved "a separate project for which Timber Ridge sought defense and indemnity" and also involved: "1) damages that were continuous and progressive, and 2) damages united by a

³ The California Supreme Court addressed "stacking" of policy limits from consecutive insurance policies in *State of California v. Continental Insurance Co.* (2012) 55 Cal.4th 186: " 'Stacking' generally refers to the stacking of policy limits across multiple policy periods that were on a particular risk. In other words, 'Stacking policy limits means that when more than one policy is triggered by an occurrence, each policy can be called upon to respond to the claim up to the full limits of the policy.' . . . The all-sums-with-stacking indemnity principle . . . 'effectively stacks the insurance coverage from different policy periods to form one giant "uber-policy" with a coverage limit equal to the sum of all purchased insurance policies.' " (*Id.* at pp. 200-201; see also *State of California v. Continental Ins. Co.* (2017) 15 Cal.App.5th 1017, 1030.)

singular cause of injury-construct defect. . . . Accordingly, under either a theory of continuous and progressive damage, or a theory of unified cause of injury, all of the insurers must defend an insured and the insured may elect which deductible to pay. As is its right, Timber Ridge paid the one deductible owed for each action to Timber Ridge's other indemnifying insurers, Claremont . . . and Arch" It argued Lexington had a duty to defend the entire actions regardless of whether a portion of property damage occurred on another carrier's time or risk, or whether Timber Ridge elected to pay another indemnifying insurer's deductible. Timber Ridge argued that by demanding one deductible for both the *Perez* and *Lussenden* actions, Lexington had acknowledged that all of the damages arising from the cross-complaint amounted to a single claim and occurrence, and that California law held in this circumstance that only a single deductible was triggered. Timber Ridge asserted it had already paid deductibles to Claremont and Arch and could not be compelled to pay a second.

Timber Ridge presented two declarations in opposition to the motion. Its president, Lance Hayes, averred in part that "[a]ll of the damages alleged in the *Perez* [and *Lussenden*] Action[s] arose from a single source of injury—construction defect." He further averred that both actions were "construction defect action[s] and thus damages alleged spanned multiple policy years as a continuous and progressive injury." Scott Dinslage, Timber Ridge's retained architect consultant, stated he had reviewed the

pleadings and damage allegations⁴ in both the *Perez* and *Lussenden* actions. As to both, he averred: "The damage allegations in the . . . Action potentially attributable to the work of Timber Ridge are the types of damage that may incept at any time after date of completion of the framing work and continues or progresses over time. Such types of property damage include water intrusion and structural damages. In other words, the damages alleged to have been attributable to the work of Timber Ridge were continuous and progressive in nature."

The trial court granted summary judgment, ruling Lexington had performed its obligations under the Policy by providing a defense on the cross-complaints and settling them, and Timber Ridge had not raised a triable issue of material fact as to any defense. The court found Timber Ridge presented no evidence to support its theory of continuous and progressive damage as the case involved "numerous separate homeowners making separate claims for property damage," and the underlying cases on which Timber Ridge relied did not involve such damage. It rejected Timber Ridge's argument that it had no

⁴ Dinslage summarized the damage allegations as follows: "a. 'framing, siding and structural defects' . . . [¶] b. 'stucco, exterior siding, exterior walls, including without limitation, exterior framing and other exterior wall finishes and fixtures and the systems of those components and fixtures, including but not limited to, pot shelves, horizontal surfaces, columns, and plantons, at the property allow unintended water to pass into the structure or to pass beyond, around, or through the designed or actual moisture barriers of the system, including any internal barriers located within the system itself' . . . [¶] c. 'foundations, load bearing components, and slabs at the property contain significant cracks or significant vertical displacement' . . . [¶] d. 'foundations, load bearing components, and slabs at the property cause the structure, in whole or in part, to be structurally unsafe.' . . . [¶] e. 'stucco, exterior siding, and other exterior wall finishes and fixtures, including but not limited to, pot shelves, horizontal services, columns, and plantons, at the property contain significant cracks or separations.' "

contractual duty to pay Lexington a deductible because its payments to Claremont and Arch satisfied its deductible payment obligations, ruling Timber Ridge "does not cite any contractual provision that excuses it from paying its deductible." The court acknowledged Timber Ridge's argument that Lexington was engaging in impermissible deductible stacking, but rejected it on grounds Timber Ridge "cite[d] no authority to support the argument under the facts of the case" and "fail[ed] to explain why it paid three separate deductibles to Arch."

Timber Ridge filed this appeal from the ensuing judgment.

DISCUSSION

I. *Summary Judgment Standards and Standard of Review*

"Summary judgment is appropriate only 'where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law.' " (*Regents of University of California v. Superior Court* (2018) 4 Cal.5th 607, 618-619; see *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843; *Woodridge Escondido Property Owners Assn. v. Nielsen* (2005) 130 Cal.App.4th 559, 568.) A plaintiff moving for summary judgment, as Lexington did here, has a burden of persuasion that each element of its cause of action has been proved, and hence there is no defense to that cause of action. (*Aguilar*, at p. 850; *Woodridge*, at p. 568.) The plaintiff also has a burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact. (*Ibid.*; see *Welborne v. Ryman-Carroll Foundation* (2018) 22 Cal.App.5th 719, 724; *Woodridge*, at p. 568.) " 'Once the plaintiff . . . has met that burden, the burden shifts to the defendant . . . to show that a triable issue of one or more material facts exists

as to that cause of action or a defense thereto. The defendant . . . may not rely upon the mere allegations or denials' of [its] 'pleadings to show that a triable issue of material fact exists but, instead,' must 'set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto.' " (*Aguilar*, at p. 850; see Code Civ. Proc., § 437c, subd. (p)(1).) " 'There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.' " (*Woodridge*, at p. 568.)

" 'On review of an order granting or denying summary judgment, we examine the facts presented to the trial court and determine their effect as a matter of law.' [Citation.] We review the entire record, 'considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained.' [Citation.] Evidence presented in opposition to summary judgment is liberally construed, with any doubts about the evidence resolved in favor of the party opposing the motion." (*Regents of University of California v. Superior Court*, *supra*, 4 Cal.5th at p. 618.) We are not bound by the trial court's determination; we review only the result, not the court's reasoning and must affirm if its decision is correct under any legal theory, even if its reasoning is erroneous. (*Conway v. County of Tolumne* (2014) 231 Cal.App.4th 1005, 1020, fn. 5; *William L. Lyon & Associates, Inc. v. Superior Court* (2012) 204 Cal.App.4th 1294, 1304.)

II. *Timber Ridge Presented a Triable Issue of Material Fact as to Continuous and*

Progressive Damage

The trial court ruled that Timber Ridge failed to raise a triable issue of material fact as to whether the property damage in the *Perez* and *Lussenden* actions qualified as continuous and progressive injury. Having viewed the summary judgment papers de novo as we must, we conclude the court erred in that aspect of its ruling.⁵

In support of its motion, Lexington presented evidence via the declaration of recovery representative Kathleen Ludwig that (1) Timber Ridge had two insurance policies with Arch covering January 9, 2003, to January 9, 2004, and January 9, 2004, to January 9, 2005; (2) Lexington had issued Timber Ridge policies from April 15, 2005, to April 15, 2006, and from April 15, 2006, to April 15, 2007; and (3) Claremont provided coverage to Timber Ridge between April 15, 2007, and April 15, 2009. Ludwig averred that none of the other insurers' policy periods overlapped with the Lexington Policy periods. From this, she averred "there was no situation in which Lexington and another insurer were on risk during the same time frame." Ludwig did not address the type or nature of the damages alleged in the *Perez* or *Lussenden* actions; she did not say whether they were unique as to each home, arose from one incident, or were continuous and progressive.

⁵ We acknowledge that Timber Ridge also argues Lexington did not meet its threshold summary judgment burden of production to show no triable issue of material fact on the issue of whether the underlying actions involved a continuous or progressive loss. It is true that Lexington did not address that issue in its summary judgment motion, but Lexington focused exclusively on the elements of breach of contract, particularly whether Timber Ridge breached the insurance contract by failing to meet its obligation to pay the deductible under the Policy's deductible endorsement. Lexington met its threshold summary judgment burden based on the policy language alone.

Timber Ridge in opposition presented declarations from both Hayes and Dinslage, in which, as summarized above, they stated the damage suffered in both actions was continuing and progressive, and the result of one occurrence: construction defect. Lexington did not separately lodge objections to this evidence, but included them in its reply separate statement of material facts. As a result, the trial court declined to consider those objections. Lexington does not challenge that ruling on appeal and thus we must consider Timber Ridge's evidence. (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 852.) Nevertheless, Lexington argues "[t]here is no evidence presented by [Timber Ridge] that all of the homes it worked on with unique defects like cracked stucco, damaged pot shelf, etc., all arose from one accident and were somehow one continuous or progressive occurrence." Citing paragraphs of the Ludwig declaration that do not address the point,⁶ Lexington maintains "[e]ach home had unique and distinct damage, for example an alleged stucco crack on a house Lexington covered in *Perez* is not the same accident/occurrence as a misaligned pot shelf defect on the house Claremont covered." It argues Timber Ridge presented only a "theoretical possibility that they could be" the same occurrence covered simultaneously under both policies.

⁶ Lexington cites paragraph Nos. 26, 29 and 39 of Ludwig's declaration. Those state only that Lexington "determined . . . [it] was the insurer on risk for seventeen of the homes [in the *Perez* action], while another insurer was on risk for one of the . . . homes"; Lexington "was never notified that [Timber Ridge] wished for Lexington to not provide coverage"; and that Lexington had determined there were eleven homes on which Timber Ridge performed work in the *Lussenden* action, eight of which Timber Ridge worked on during Lexington's Policy periods, and three of which it worked on while another policy was on risk.

These arguments lack merit. Lexington fails to appreciate that under settled summary judgment principles, this court must accept as true Timber Ridge's evidence and all reasonable inferences therefrom, while strictly scrutinizing Lexington's evidence. (See *City of San Diego v. Superior Court* (2006) 137 Cal.App.4th 21, 25; *Serri v. Santa Clara University*, *supra*, 226 Cal.App.4th at p. 852.) Doing so compels only one conclusion: Timber Ridge's uncontradicted evidence raised a triable issue of material fact as to whether the damages suffered by the *Perez* and *Lussenden* plaintiffs due to construction defects were continuous and progressive. Defective construction can give rise to such continuous and progressive injury (see, e.g., *Century Indemnity Co. v. Hearrean* (2002) 98 Cal.App.4th 734, 743 ["trigger of coverage [was] the continuous and progressive injury to the hotel property caused by defective design and construction"]; see also *Pepperell v. Scottsdale Ins. Co.* (1998) 62 Cal.App.4th 1045; *St. Paul Mercury Ins. Co. v. Mountain West Farm Bureau Mutual Ins. Co.* (2012) 210 Cal.App.4th 645, 660 [framer was source of siding and roofing defects, supporting trial court's conclusion that the property damage arising out of framer's work was of a continuous and progressive nature]), so Timber Ridge's position on this point is not precluded as a matter of law.

III. *Timber Ridge's Claim Regarding Stacking of Deductibles*

The foregoing conclusion allows us to consider the main argument made by Timber Ridge in challenging summary judgment, which is premised on the existence of continuous and progressive property damage: that California law prohibits the stacking of deductibles of several insurance policies triggered by the same continuous and

progressive loss. Timber Ridge relies on *California Pacific Homes, Inc. v. Scottsdale Ins. Co.* (1999) 70 Cal.App.4th 1187 (*California Pacific*) and other cases that it claims support this conclusion. To address this and other contentions, we set out some basic principles presented by Lexington's summary judgment motion and this insurance dispute, then address *California Pacific* and the other authorities.

A. *Insurance Policy Interpretation and the Nature of Deductibles*

The California Supreme Court summarized principles of insurance policy interpretation in *State of California v. Continental Insurance Co.*, *supra*, 55 Cal.4th 186: "In general, interpretation of an insurance policy is a question of law that is decided under settled rules of contract interpretation. [Citations.] ' "While insurance contracts have special features, they are still contracts to which the ordinary rules of contractual interpretation apply." [Citations.] 'The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties.' [Citations.] 'Such intent is to be inferred, if possible, solely from the written provisions of the contract.' [Citations.] 'If contractual language is clear and explicit, it governs.' [Citation.] ' "The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special meaning is given to them by usage' [citation], controls judicial interpretation." ' " (*Id.* at pp. 194-195.)

" 'A policy provision will be considered ambiguous when it is capable of two or more constructions, both of which are reasonable.' [Citations.] A term is not ambiguous merely because the policies do not define it. [Citations.] Nor is it ambiguous because

of '[d]isagreement concerning the meaning of a phrase,' or ' "the fact that a word or phrase isolated from its context is susceptible of more than one meaning." ' [Citation.]

' "[L]anguage in a contract must be construed in the context of that instrument as a whole, and in the circumstances of that case, and cannot be found to be ambiguous in the abstract." ' [Citation.] 'If an asserted ambiguity is not eliminated by the language and context of the policy, courts then invoke the principle that ambiguities are generally construed against the party who caused the uncertainty to exist (i.e., the insurer) in order to protect the insured's reasonable expectation of coverage.' " (*State of California v. Continental Ins. Co.*, *supra*, 55 Cal.4th at p. 195; see *Pardee Construction Co. v. Insurance Company of the West* (2000) 77 Cal.App.4th 1340, 1352.) " '[I]n doubtful cases, the law favors the insured over the insurer.' " (*Beaumont-Gribin-Von Dyl Management Co. v. California Union Insurance Company* (1976) 63 Cal.App.3d 617, 622 (*Beaumont*), disapproved on other grounds in *Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.* (1993) 5 Cal.4th 854, 865, fn. 5; see also *City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 397 [ambiguities in policy provisions are generally resolved against the insurer and in favor of coverage].)

Further, it is useful to understand the nature of a deductible. " 'Liability insurance policies often contain a 'deductible' . . . requiring the insured to bear a portion of a loss otherwise covered by the policy.' [Citation.] A 'deductible' is a portion of an insured loss for which the insured is responsible. [Citation.] It generally is 'a specific sum that the insured must pay before the insurer owes its duty to indemnify the insured for a covered loss.' " (*Forecast Homes, Inc. v. Steadfast Ins. Co.* (2010) 181 Cal.App.4th

1466, 1473-1474, italics omitted; see also *General Star National Insurance Corp. v. World Oil Company* (C.D.Cal. 1997) 973 F.Supp. 943, 948.)⁷ A policy may also permit an insurer to accept its duty to defend and pay the deductible to effect settlement, then seek reimbursement of the deductible from the insured. (See *New Hampshire Insurance Co. v. Rideout Roofing Co.* (1998) 68 Cal.App.4th 495, 500-501, 506.)

Because a deductibility clause functions as a limitation on the insurer's liability, it must be treated the same as other policy limitations, exceptions or exclusions, meaning it will be strictly construed against the insurer. (*Beaumont, supra*, 63 Cal.App.3d at p. 623.) Nevertheless, a court will not distort the plain meaning of the contract to impose unassumed liability on the insurer. (*Ibid.*)

B. *California Pacific*

In *California Pacific*, a plaintiff builder sued two of its liability insurers, Scottsdale and National, for declaratory relief and breach of contract stemming from a construction defect lawsuit involving a condominium project. (*California Pacific, supra*,

⁷ The *Forecast Homes* court went on to explain a self-insured retention: "The term 'retention' (or 'retained limit') refers to a specific sum or percentage of loss that is the insured's initial responsibility and must be satisfied *before* there is any coverage under the policy. It is often referred to as a 'self-insured retention' or 'SIR.'" [Citation.] Unlike a deductible, which generally relates only to damages, [a] SIR also applies to defense costs and settlement of any claim." (*Forecast Homes, Inc. v. Steadfast Ins. Co., supra*, 181 Cal.App.4th at p. 1474.) A true self-insured retention "expressly limits the duty to indemnify to liability in excess of a specified amount *and* expressly precludes any duty to defend until the insured has actually paid the specified amount." (*Legacy Vulcan Corp. v. Superior Court* (2010) 185 Cal.App.4th 677, 694, fn. 12.)

70 Cal.App.4th at pp. 1189-1191.) The parties agreed that due to the construction defects, the claims against the plaintiff arose from a single occurrence involving continuous or progressively deteriorating property damage from 1984 to 1995. (*Id.* at p. 1189-1190.) The defendants had issued five successive CGL policies from June 1990 to June 1995, each having a self-insured retention of \$250,000 of the ultimate net loss as the result of any one occurrence because of personal injury, property damage or both combined. (*Id.* at p. 1190 & fn. 1.) The policies stated each insurer would be liable for " '\$1,750,000 [of] ultimate net loss as the result of any one occurrence because of personal injury, property damage, or both combined' " and set the same limit on an " 'ultimate net loss as the result of all occurrences during each policy year' " (*Id.* at p. 1190.) The term "ultimate net loss" was defined as " 'the sums for which the Insured is legally liable as damages by reason of . . . a settlement made with the written consent of the claimant, the Insured and the Company.' " (*Id.* at p. 1193.) The policy further provided " '[t]he Company will pay [on] behalf of the Insured the ultimate net loss in excess of the retained limit hereinafter stated which the Insured shall become legally obligated to pay as damages' " (*Ibid.*)

After the insured settled the construction defect lawsuit for \$1,975,000, it demanded that Scottsdale pay indemnity under one of the policies in excess of its self-insured retention. (*California Pacific, supra*, 70 Cal.App.4th at p. 1190.) The defendants agreed to contribute a particular amount under a reservation of rights, and took the position that before they had a duty to indemnify the insured, the insured was obligated to

pay \$1,250,000, equaling its \$250,000 retention under all five insurance policies. (*Ibid.*) The trial court rejected the insurers' argument for stacking of the retained limits. (*Id.* at p. 1194.) It relied on *Montrose Chemical Corp. v. Admiral Insurance Co.* (1995) 10 Cal.4th 645, as applied by *Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co.* (1996) 45 Cal.App.4th 1. (*California Pacific*, at pp. 1192-1193.) In *Montrose*, the California Supreme court adopted the " 'continuous injury' trigger of coverage" approach to continuing damage claims, so property damage that was "continuous or progressively deteriorating throughout successive policy periods are covered by all policies in effect during those periods." (*Montrose*, at p. 675.) *Armstrong* had held that where CGL policies provided the insurer would "pay 'for 'all sums which the insured shall become liable to pay as damages" ' the insured could select one policy, if several provided coverage, to apply to each claim." (*California Pacific*, at p. 1193, citing *Armstrong*, 45 Cal.App.4th at pp. 49-50, fn. 15.) The trial court entered judgment for the insured, finding the policy had established a \$250,000 retained limit for any one occurrence, thus " 'each of the Defendant insurers is and was obligated to indemnify [the insured] for that portion of the . . . settlement that exceeds a single retained limit of \$250,000.' " (*California Pacific*, at pp. 1191, 1193, 1194.)

The Court of Appeal affirmed. Its holding turned on the wording of the insurance policies, including the self-insured retention language, which it found to be "clear and explicit." (*California Pacific, supra*, 70 Cal.App.4th at p. 1192.) The court focused on the fact that the insured's self-insured retention was \$250,000 of the " 'ultimate net loss as the result of any one occurrence because of . . . property damage' " and there was a single

occurrence involving continuous and progressive property damage, which took place during the time in which the first Scottsdale policy was in force. (*Ibid.*) According to the appellate court, the conclusion to be drawn was that "once the ultimate net loss of [the insured] had exceeded \$250,000 the Scottsdale policy provided coverage up to \$1,750,000 'as the result of any one occurrence because of . . . property damage.' " (*Ibid.*)

Though the policies in *California Pacific* used the term "ultimate net loss," and not the "all sums" language of *Armstrong World Industries Inc. v. Aetna Casualty & Surety Co.*, *supra*, 45 Cal.App.4th 1, the appellate court found the ultimate net loss definition consistent with the conclusion that each of the insurers was obligated to indemnify the insured for that portion of the settlement exceeding a *single* retained limit of \$250,000. (*California Pacific*, *supra*, 70 Cal.App.4th at p. 1193.) The policies were occurrence policies, and the insured made a demand under a single policy for the amount of an ultimate net loss within the policy limits for one occurrence under that single policy. (*Id.* at pp. 1194-1195.) The insured thus received full indemnity for its ultimate net loss beyond the retained limit based on an occurrence for which all of the insurers had stipulated there was coverage. (*Id.* at p. 1194.) The *California Pacific* court observed that under the circumstances, "stacking of retained limits would have the effect of affording an insured far less coverage for occurrence-based claims than the insured has purchased." (*Ibid.*)

At least one court considering *California Pacific* recognizes that its holding is limited to circumstances where the insured makes a single claim against only one of multiple policies whose coverage is triggered by continuous damage, within the limits of

the policy. (See *Virginia Surety Co. v. Lexington Ins. Co.* (N.D. Cal. 2011) 2011 WL 2653374, *3 [*California Pacific* "held that stacking of [self-insured retentions] was not appropriate where the insured made one claim against one policy and the settlement amount fell under that policies' limits"]; see also Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2018) ¶ 7:383.6, p. 7A-159 [citing *California Pacific*: "At least where the insured makes a claim under a single policy with adequate coverage limits, the insurer paying the loss *cannot* reduce its liability by 'stacking' deductibles under other policies 'triggered' by the continuing injury"].)

Other courts see *California Pacific* as consistent with the notion that where multiple insurance policies are triggered for continuous losses, the insurers' indemnity or coverage obligations—as well as the treatment of self-insured retentions—are governed by the interpretation of each policy between the insured and insurer. (See *Montgomery Ward & Company, Inc. v. Imperial Casualty & Indem. Co.* (2000) 81 Cal.App.4th 356, 370 (*Montgomery Ward*).) In *Montgomery Ward*, the court addressed whether an insured was required to exhaust all of the self-insured retentions within multiple potentially applicable insurance policies before the insurers' duty to indemnify or provide coverage arose. (*Montgomery Ward*, at p. 364.) *Montgomery Ward* held that self-insured retentions were not the same as primary or underlying insurance such that horizontal exhaustion applied, that is, the retentions did not need to be exhausted before coverage under any of the policies would be implicated. (*Id.* at pp. 364, 366.) It emphasized that the exhaustion cases relied upon by the insurers, "like all other insurance cases, look first to the terms of the policy." (*Id.* at p. 368.) In *Montgomery Ward*, each policy required

the insurer to indemnify the insured for the ultimate net loss in excess of a specified dollar amount whether or not the insured had primary insurance, and thus the insurers were seen to have distinguished and understood the difference between the retained limits and underlying insurance, requiring them to be bound by the policy language. (*Id.* at pp. 366-367.) The court declined to rewrite the policy language to deem it to be "excess" to the retentions. (*Id.* at p. 367.)

C. *California Pacific's Principles Do Not Govern Timber Ridge's Responsibility to Pay Deductibles, Which is Addressed by Specific and Unambiguous Terms of the Lexington Policy*

As Timber Ridge concedes, Lexington's duty to defend or provide indemnity is not implicated in this appeal; it points out the "only issue is whether Lexington can charge a deductible to an insured who has already paid a deductible for the same 'claim' arising from the same progressive damage originating from the same occurrence" Based on the principles of *California Pacific*, *Montgomery Ward*, and other cases, Timber Ridge argues deductibles cannot be stacked in a circumstance where there are multiple insurers covering one claim or occurrence. It maintains a deductible should be treated as equivalent to a self-insured retention for purposes of the anti-stacking rule, and under the Lexington Policy only one deductible applies per claim. Thus, according to Timber Ridge, it "had the right to elect the deductible to pay when billed for the deductibles," particularly when it had not been admonished that it was subject to multiple deductibles. It argues there is no factual or legal basis under the Policy or otherwise for Lexington to divide the loss into separate claims or occurrences based on the completion date of the

homes; rather all of the damages arose from common conditions and formed only a single occurrence. Finally, Timber Ridge contends any ambiguities in the Policy's deductible provision must be construed in its favor, and here the Policy contains no language subjecting Timber Ridge to multiple deductibles based on the number of defects, the date of any home's completion, or any other factor.

Lexington responds that Timber Ridge's entire argument is moot because it has already provided coverage, and under the unambiguous terms of its insurance contract, Timber Ridge owed the deductible. It maintains the Policy does not support the argument that Timber Ridge can dictate when and to whom it owes a deductible. Rather, Lexington insists that if there were truly only one occurrence, Timber Ridge should not have tendered to two separate carriers for coverage. It contends the Policy did not cover the other homes for which other insurers were responsible.

On this summary judgment record, it is undisputed that Lexington treated the *Perez* and *Lussenden* cross-complaints as each involving one claim, and took the position that one deductible applied per claim.⁸ There is no dispute that Lexington provided

⁸ The summary judgment papers did not present any controverted issue as to whether the damages in each action gave rise to one claim or multiple claims. Timber Ridge thus relies on inapposite authorities involving whether a loss gave rise to one claim or multiple claims and the potential that an insured might pay multiple deductibles to a single insurer. (See *Beaumont, supra*, 63 Cal.App.3d 617 [property managers absconded with trust funds of multiple clients, held to be one "claim" giving rise to one deductible under ambiguous policy language of a single policy]; *EOTT Energy Corp. v. Storebrand International Insurance Co.* (1996) 45 Cal.App.4th 565, 578 [over 650 thefts of diesel fuel products, if caused by a systematic and organized scheme to steal, would constitute one occurrence or loss: "In our view, EOTT's objectively reasonable expectation would embrace the conclusion that multiple claims, all due to the same cause or a related cause,

indemnity and a defense in both actions, satisfying its policy obligations. It then settled each claim and sought repayment of its deductible under the reimbursement clause of the Policy: "We may pay any part or all of the deductible amount to effect settlement of any claim or 'suit' and, upon notification of the action taken, you shall promptly reimburse us for such part of the deductible amount as has been paid by us."

Though we have concluded that Timber Ridge established a triable issue of material fact as to whether the damage was continuing and progressive, triggering coverage from the Lexington Policy and other policies, we agree the facts here do not

would be considered a single loss to which a single deductible would apply").) These cases in any event turn on the plain meaning of the language of each insurance policy at issue (or ambiguity in the policy language), which is critical in determining whether particular losses give rise to one claim and one deductible or multiple claims and multiple deductibles. (See *B.H.D., Inc. v. Nippon Insurance Co.* (1996) 46 Cal.App.4th 1137, 1143 [distinguishing *EOTT Energy Corp.* and holding jewelry thefts by a single person over several months required payment of one \$10,000 deductible for each theft; "The central distinction . . . is the difference in the policy language. Rather than a provision [as in *EOTT Energy Corp.*] that suggests aggregation of all thefts into a single claim ('all claims . . . arising out of any one occurrence . . . shall be adjusted as one claim'), the policy in this case specifically applied the deductible to each loss 'separately occurring.' There was no comparable provision in *EOTT*, or the cases it cites"]; *Haerens v. Commercial Cas. Insurance Co.* (1955) 130 Cal.App.2d Supp. 892, 893-894 [word "claim" as used in deductible provision was ambiguous, and thus court would interpret language to deem plaintiff's claim for \$425 to replace multiple scratched window panes as a single claim requiring a single \$50 deductible rather than multiple claims for each window pane requiring multiple deductibles].) These cases do not involve multiple insurers on the risk for a single claim or occurrence. Another authority cited by Timber Ridge—*Chemstar v. Liberty Mutual Insurance Co.* (9th Cir. 1994) 41 F.3d 429—did not address whether the insured owed one or more deductibles; it held the underlying cause of property damage involving 28 homes and different claimants was a manufacturer's failure to adequately warn that a product was intended for exterior use, and thus the incidents gave rise to one occurrence. (*Id.* at pp. 433, 437, disapproved by *Montrose Chemical Corp. v. Admiral Insurance Co.*, *supra*, 10 Cal.4th 645, as recognized in *Hughes Aircraft Co. v. Century Indem. Co.* (9th Cir. 1998) 141 F.3d 1176, *5 [nonpub. opn.]

present an issue of allocation, exhaustion or "stacking" of deductibles. Rather, we conclude there is merit to Lexington's argument that the unambiguous language of its Policy requires Timber Ridge to reimburse it the \$25,000 deductible for each claim, and that Timber Ridge cannot present a triable issue of fact as to this obligation. In this case, the straightforward terms of the Policy take precedence and we resolve the issue based strictly on the Policy's language. (*State of California v. Continental Insurance Co.*, *supra*, 15 Cal.4th 1017, 1031, quoting *Montgomery Ward*, *supra*, 81 Cal.App.4th at p. 368.) The reimbursement clause of the Policy broadly gives the insurer the right "to look to the insured for payment of deductibles as and when the former settles claims on behalf of the latter." (*New Hampshire Insurance Co. v. Rideout Roofing Co.*, *supra*, 68 Cal.App.4th at pp. 501-502 [addressing same deductible endorsement language].) It requires Timber Ridge to *reimburse* the deductible to Lexington; Black's Law Dictionary (5th ed. 1979) at page 1157 defines "reimburse" as "[t]o pay back [or] to repay that expended" (See also *Los Angeles County v. Frisbie* (1942) 19 Cal.2d 634, 640 ["The primary and ordinary meaning of the word 'reimburse' is 'to pay back, to make restoration, to repay that expended' ".]) The Policy's reimbursement clause comports with this definition. It means that on notification, Timber Ridge will promptly pay back deductible amounts that Lexington has put forth, which Lexington did in both the *Perez* and *Lussenden* actions. The Policy obligates Timber Ridge to meet the deductible *after* Lexington covers the loss and pays deductible amounts to settle claims. The language of this provision is not reasonably susceptible to any other meaning; it is thus plain and unambiguous. (*State of California v. Continental Ins. Co.*, *supra*, 55 Cal.4th at p. 195;

Pennsylvania General Insurance Co. v. American Safety Indemnity Co. (2010) 185 Cal.App.4th 1515, 1527.) Where insurance policy language is unambiguous, as here, the policy language, not the insured's subjective expectations, controls the policy's interpretation. (*Powerine Oil Co., Inc. v. Superior Court*, *supra*, 37 Cal.4th at p. 404; *Pardee Construction Co. v. Insurance Co. of the West*, *supra*, 77 Cal.App.4th at p. 1352.) In view of this language, it is not objectively reasonable for Timber Ridge to expect that Lexington would accept its defense and indemnity obligation and pay monies in settlement of claims, but not seek to collect the \$25,000 deductible applicable to each claim for which Timber Ridge is responsible under the plain Policy terms.

Because Lexington here assumed its duty to defend and indemnify Timber Ridge and paid to settle the claims, this case is distinguishable from *California Pacific* and the other cases cited by Timber Ridge. Both *California Pacific* and *Montgomery Ward* involved self-insured retentions, which is a portion of risk that is not covered by the policy at all. That is, the insurer's coverage obligation did not come into play until after the insured satisfied this initial "retained" portion of the covered loss. (See *State of California v. Continental Insurance Co.*, *supra*, 15 Cal.App.4th at p. 1030; *Forecast Homes, Inc. v. Steadfast Insurance Co.*, *supra*, 181 Cal.App.4th at p. 1474.) *California Pacific* thus involved an insurer called upon to provide coverage, which it sought to avoid until the insured exhausted the self-insured retentions of other policies on the risk. (*Id.* at p. 1194, see also *Montgomery Ward*, *supra*, 81 Cal.App.4th at p. 364 [issue was whether insured had "to exhaust its [self-insured retentions] on all potentially applicable policies before any insurer has a duty to indemnify [the insured]"].) Under those circumstances,

the insurer could not *reduce its coverage liability* by requiring exhaustion of the self-insured retentions for all the other policy years before it would cover the claim. Here, Lexington is not seeking to avoid coverage, it is seeking reimbursement for monies it already paid on Timber Ridge's behalf. The posture of this case distinguishes it from *California Pacific*; Lexington accepted liability and its defense obligations, paid a sum in settlement of each claim, and now seeks to obtain reimbursement of the deductible it paid in settlement of each claim. The Policy entitles it to such repayments regardless of Timber Ridge's payment of other deductibles on other implicated policies.

Timber Ridge suggests that the California Supreme Court in *Aerojet-General Corp. v. Transport Indemnity Co.* (1997) 17 Cal.4th 38 and *State of California v. Continental Ins. Co.*, *supra*, 55 Cal.4th 186 announced or somehow support an anti-stacking rule for deductibles.⁹ Neither *Aerojet-General* nor *Continental* address the payment or stacking of deductibles for a single occurrence or claim triggering multiple policies. In *Continental*, the court held that when a continuous and progressive loss triggers multiple, successive liability insurance policies, each insurer is obligated to pay "all sums" toward damages flowing from the loss up to policy limits (*Continental*, 55 Cal.4th at p. 200) and the insured may "stack" the policy limits of all triggered policies.

⁹ Timber Ridge also cites *Armstrong World Industries, Inc. v. Aetna Casualty and Surety Company*, *supra*, 45 Cal.App.4th 1 without further explanation or pinpoint page reference. Absent pertinent legal analysis applying *Armstrong World Industries* to the circumstances of this case, we disregard the citation. (*Hodjat v. State Farm Mutual Automobile Insurance Co.* (2012) 211 Cal.App.4th 1, 10-11 [appellant is required to explain how legal authority applies in his case]; *In re S.C.* (2006) 138 Cal.App.4th 396, 411.)

(*Id.* at pp. 201-202.) *Continental* "did not . . . announce a general principle that insureds covered by multiple policies are entitled to 'select which policy(ies) to access for indemnification in the manner they deem most efficient and advantageous' " but instead "reaffirmed the principle that insurance policies must be interpreted *according to their terms . . .*" (*Montrose Chemical Corp. v. Superior Court, supra*, 14 Cal.App.5th 1306, 1325, rev. gr.) Thus, the *Continental* court's holding came with a "significant caveat" (*id.* at p. 202), namely the importance of the policy language, which did not unambiguously require pro rata allocation or forbid stacking. It pointed out that "in the future, contracting parties can write into their policies whatever language they agree upon, including limitations on indemnity, equitable pro rata coverage allocation rules, and prohibitions on stacking." (*Ibid.*; accord, *Aerojet-General*, 17 Cal.4th at pp. 75-76 [the insurance policies "provide what they provide"; "[w]e may not rewrite what [the insurer and insured] themselves wrote" and " [a]s a general matter at least, we do not add to, take away from, or otherwise modify a contract for 'public policy considerations' "].) In short, the court permitted stacking of policy limits, but only where the policy language was silent or ambiguous on the issue. Our holding that Lexington's unambiguous policy language controls and resolves Timber Ridge's responsibility to pay Lexington's deductibles is consistent with both *Aerojet-General* and *Continental*.

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

McCONNELL, P. J.

HUFFMAN, J.